ADVOCATES AND ADVOCACY

The Best of The Advocates' Journal
2005–2018

THE ADVOCATES' SOCIETY

edited by
STEPHEN GRANT, LSM, ASM

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Advocates and Advocacy: The Best of *The Advocates' Journal* 2005–2018
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President's message

> "I consider this first meeting of the Society an historic occasion. In these times of unrest, when the rights and liberties of the people are slowly being infringed upon and taken away … we need more than ever a strong, independent and courageous bar."
>
> – Isadore Levinter, Q.C., May 17, 1965

WHILE THE NATURE of unrest changes over time, the fact of change and unrest is constant. Also constant is the unique role of advocates in defending the independence of the bar and the judiciary as enduring cornerstones of a free and democratic society. In fact, in our barrister's oath, we commit to improve access to justice, safeguard the rights and freedoms of all persons, and champion the rule of law.

The Advocates' Society proudly celebrates its 55^{th} anniversary in 2018. From its roots in 1963 as a small group of senior litigators advancing their common interest in fostering a strong, courageous and independent bar, the Society has grown into a national network of more than 6,000 members. The Society's commitment to its original core values is unwavering – and pressing as ever. We are united by our dedication to access to justice and the administration of justice from coast to coast.

We are also officers of the court. Serving as the voice of our clients before decision-makers is a great privilege and a great responsibility. The Advocates' Society helps us fulfil our oaths and duties, collectively and individually, and inspires us to become the best advocates we can be.

Becoming a great advocate is a lifelong commitment. While each generation of advocates faces new challenges and demands, our history shows that we are stronger, better advocates when we support and learn from each other. To this end, the Society invests in the future of our

profession by encouraging, mentoring and training young advocates. And, for all of our members, we tirelessly reinforce the essential commitment to professionalism and civility that is the hallmark of every truly great advocate.

There is no manual, rule book or recipe to make a great advocate. There is no mould or formula. In fact, our profession is notable for the remarkable array of personalities and styles from one great advocate to the next. This is what makes our vocation so special and rewarding. Just as we can learn from the considerable experience of advocates before and around us, we can still be true to ourselves and make it our own.

This collection of some of the finest articles featured in *The Advocates' Journal* memorializes a wide spectrum of skills, tips and techniques to help us refine our craft. It provides tools for tackling the endless challenges, demands and responsibilities we face, and reminds us that we are not alone in these – that we all need courage and resilience, introspection and inspiration. Without these, we as advocates cannot fulfill our duties to the courts, our clients and, of course, ourselves. This book celebrates advocacy because, whether we win or lose in our adversarial system, we should all be proud of our profession and our integral role in the justice system.

We hope these thoughtful reflections from advocates and judges of all ages and stages will reassure you, entertain you and inspire you.

Special thanks to Stephen Grant, who marks his 10th anniversary as editor of the *The Advocates' Journal*. Stephen has preserved and nurtured the finest traditions of the *Journal* established by previous editors Moishe Reiter, Q.C., and David Stockwood, Q.C. He has a gift for encouraging busy advocates and judges to pause from their daily demands to share their wisdom. We are all beneficiaries of these indelible, timeless gems … these reminders that advocacy is a craft, and a privilege.

Sonia Bjorkquist
April 2018

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FROM THE EDITOR

The Advocates' Journal (formerly *The Advocates' Society Journal*) is a publication of analysis, critique and thought on our craft. Whether advocacy is an art, a science or both, in its purest form it is all about persuasion, powered by analytical skill and intuition. Usually, we are persuading a judge or a panel of judges, but as often as not these days, arbitrators and other tribunal adjudicators.

Persuasion may be simply trying to convince the other party, the other lawyer or your own client of the merits of a course of action. Paul Pape's charming and compelling theory is that if you can persuade your mother of the rightness of your cause, you have a winning argument. It might be no more complex than that.

It's been 13 years since The Advocates' Society published *Ethos, Pathos, and Logos: The Best of The Advocates' Society Journal 1982–2004*, recalling the classical lynchpins of rhetoric. The collection was co-edited by David E. Spiro and my predecessor, the late David Stockwood, Q.C., LSM, whose reins I assumed in the summer of 2008. It showcased the finest articles published in the *Journal* over a span of 22 years. *Advocates and Advocacy* picks up where *Ethos, Pathos, and Logos* left off, covering 2005 to 2018, now with contributors from across the country.

Have things changed? The digital age is undeniably pervasive, for better or worse. Advocacy continues unabated but has morphed into

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different forms and forums, especially with the rise of the regulatory society. Anecdotally, trials appear to be on the wane. This is not necessarily a bad thing as litigants find other means to resolve their conflict, but for the contraction, rather than expansion, of legal precedent. As arbitration, too, becomes prevalent, the decisions rendered, unless appealed, also don't find their way into the legal domain. Clearly, this is an unintended and troubling consequence of these developments.

Advocates now grapple with privacy, electronic communications, artificial intelligence and, in practice, the expansion of summary judgment. The delivery speed of legal information is nothing short of astonishing. Cases and commentary show up instantly on Facebook, Twitter, LinkedIn and other social media.

Trials and appeals can be conducted and argued by iPad, often paperless. And speaking of paper, written advocacy in motions and appeals is now more pronounced and important than oral advocacy. To the next generation of advocates, our older ways will seem archaic, but that's for then. As one sees in this volume, the clarity and cogency of our current writing on advocacy – print or electronic – remains solid.

I have collected here a selection of the best of the *Journal*, grouped into topics for ease of reference, from storytelling to humour with personal reflections in between.

With thanks to Irwin Law, our partner in this venture.

For me, being the editor of *The Advocates' Journal* remains a privilege.

Stephen Grant, LSM, ASM
April 2018

Part One

ADVOCATES AS STORYTELLERS

IN MANY WAYS, advocates are actors and storytellers, especially in front of a jury. They might write their scripts to begin, but the frailty of witnesses makes going off-script as much the rule as the exception. Like every story, each case, whether at trial or on appeal, has a moral. It generally portrays a party wearing a "white hat'' and another wearing a "black hat," usually more nuanced than that distinction implies. The authors in this chapter – judge, advocates, former actors and novelist – reflect their different vantage points on lawyers and the "stories" we tell.

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WINTER 2010

The power of context

BENJAMIN ZARNETT, LSM

MUCH HAS BEEN written, from many different perspectives, about good advocacy. Experienced advocates have described their own habits and practices, implicitly inviting emulation. Judges have pointed out what impresses them. Still others have detailed the misadventures of bad advocates, suggesting the possibility that one can reverse-engineer a good advocate by avoiding the pitfalls of an atrocious one.[1]

One comes away from reading about good advocacy struck by the variety of things one could or should do to achieve it. That impression is reinforced, at least for me, by years of working with and litigating against advocates who are superb yet who have different intellectual backgrounds, personalities and natural gifts, and who apply different skills. Yet despite the variety there is, for me, a certain mode of thinking, a core belief, that seems to be shared by those who excel in advocacy. To be a good advocate, one must believe in the power of context.

Context is the raw material of advocacy. It consists, to name only a few examples, of those facts that put bad facts in perspective; of the language in other parts of the contract that illuminates a contentious term's meaning; of the array of indicators of legislative meaning that helps to interpret the statutory provision in question; of those facts that

1 Some of the best writing on advocacy is collected in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal, 1982–2004* (Toronto: Irwin Law, 2005).

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distinguish the *ratio* of a previous decision from the case at hand. Advocates create and use context to argue, explain and persuade. Indeed, the use of context is one of the most powerful tools of advocacy. In important ways, it is the very essence of advocacy.

This is so, I think, for three essential reasons. First, for an advocate, context can drive the meaning of language. Second, context can provide the answer to our most basic advocacy questions, such as what do we say first and what do we say second. Third, context is the bridge between what the advocate's ultimate point is and what the advocate's audience, the judge, will take on board.

CONTEXT AND LANGUAGE

Most cases turn on language. What the contract means, what the legislature intended, what one party meant by what was said to another, what previous cases have decided and what they leave open – these questions all require an interpretation of the words used. Most lawyers can recite the words and suggest a meaning, but good advocates *argue* for a meaning, and do so by using context to drive the words to the meaning for which they contend. The good advocate's theory of language resembles one that was ascribed to the early legal realists:

> There was a time when words were thought to have a fixed, determined content, a meaning partaking of objective Platonic forms. In the absence of a belief in Platonic intelligible essences, however, *no interpretation or application of language can be logically required by the language itself. Words are created by people in history, and their definition inevitably varies with particular context and with the meaning brought to them by the judges who are asked to interpret them.*[2] [emphasis added]

If proof is needed that the meaning of any word can bend to the context, then consider the word "clear," a bedrock legal term so important that, for example, the rules of evidence about interpreting a contract change depending on whether the language is ambiguous (susceptible to more than one meaning) or "clear" (has only one meaning). But does

2 Elizabeth Mensch, "The History of Mainstream Legal Thought" in David Kairys, ed., *The Politics of Law: A Progressive Critique*, 3rd ed. (New York: Basic Books, 1998) 23.

the word "clear" have only one meaning? Let's examine the word in these two contexts:

a) "Now that you say it that way, *I see* your point precisely. It *is clear*. It *is obvious*."
b) "After they had been cleaned, I almost walked right into the sliding glass doors. I could *not see* them. They were *so clear*, they were *invisible*."

The meaning of the word "clear" isn't clear. It depends on the context – something the good advocate believes about all words and combinations of words. The recognition that the meaning of words can be driven by the context leads the advocate to introduce or stress all of the permissible context that will support a favourable interpretation.

The use of context by the skilful advocate extends not just to context that we might think of as bearing directly on meaning, but to context that does so indirectly because it speaks to the acceptability of the contended-for meaning. Consider the following two hypothetical contextual arguments on an appeal where the issue is whether an oral amendment to a written contract is enforceable in the face of a clause that the advocate says negates the validity of an amendment made that way:

- *Example A*: The trial judge found that after the written contract was made, the parties orally agreed to amend it. But the trial judge was technically wrong, because among the boilerplate terms in the contract was one that said the contract could only be amended in writing.
- *Example B:* The parties painstakingly defined, in writing, the terms of their business arrangement – with great precision and after legal advice. They included a clause excluding prior and contemporaneous oral contracts. Their intention was to define all their rights and obligations in writing.

They then included a clause that pointed to the future. Any amendment had to be in writing signed by the parties. In other words, if the contract was to be changed, a written document had to be signed; nothing less would do. Now what did the parties intend by that clause? Consistent with the rest of their dealings as shown by the contract, they did not want their rights to be left to the uncertainty of who said what to whom, to the faults and frailties of memories or to the admittedly

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imperfect system by which a trial judge must try to determine what had been orally agreed. They wanted the certainty of writing, and they did it by a perfectly even-handed clause that would operate to preclude assertions of oral amendments by *either* party. The trial judge was wrong to ignore these intentions and give effect to what one side said was an oral amendment.

Example A suggests, in a counterproductive way, that a favourable meaning should be given to something that is technical and boilerplate and that it should oust an oral agreement found to have been made. The second argument uses the context of the rest of the written agreement, and in effect acts out the parties' presumed negotiating intentions to rationalize the clause and to ease the acceptance of a meaning that will negate the oral amendment.

CONTEXT AND THE ORDER OF PRESENTATION

A primary determinant of the order in which good advocates say things, write things or even ask questions is that they do so as much as possible in an order that makes the best use of context. The belief that context will shape meaning is what leads good advocates to adopt "point first" advocacy, sometimes described as context (or a description of what the point is or where it is heading), before detail. Good advocates do this whenever they are communicating for the purpose of persuasion, be it in examination- in-chief, in pleadings, in oral argument or in written argument. They do so because it makes the arguments easier to follow by telling the listeners what they will be hearing and why they will be hearing it (or reading it) before the details are dumped upon them. This alone would be a sufficient reason. But they also do so because the context provided will influence the meaning, emphasis or significance of the detail that follows. Consider these two examples:

a) "This is an appeal by the Reverend Martin Luther King Jr. from an order forbidding a non-violent march to protest racial segregation and racially motivated violence in Birmingham, Alabama. Although the court will not hear an appeal from an order the appellant has not obeyed except in exceptional circumstances, the court should hear this appeal."[3]

3 See *Walker v. Birmingham*, 388 U.S. 307 (1967).

b) "This is an appeal by Mr. Smith from a series of child support orders with which he has not complied. The court will not hear an appeal from an order that the appellant has not obeyed except in exceptional circumstances. The court should not hear this appeal."

In the first example, the words "except in exceptional circumstances" practically jump off the page with significance; in the second they all but disappear. The difference results from the context first provided.

The recognition of the power of context also explains why good advocates know where to start a submission – for example, why some arguments should begin with the law and then move to the facts, whereas others should begin with the facts and move to the law. In some cases, the facts provide context for the law that the advocate wants interpreted, nuanced or viewed a certain way. In others, the law provides the context in which to appreciate and interpret the facts.

CONTEXT AND BRIDGE BUILDING

Compare the descriptions of advocates given by clients or other lawyers with the descriptions given by judges. To the former, advocates are aggressive, tenacious, forceful, plodding, boring, well-prepared and so on. But to judges they are either "helpful" or "not helpful." Good advocates present cases and argue in such a way that the judge thinks the advocate is there to help the judge reach the "right" result. That can only be done if the advocate is empathetic with his or her audience. Almost every judicial admonition about advocacy could be reduced to this: "When presenting your case, think about us." Beyond being civil and respectful, using context is the advocate's major way of being audience-friendly.

Good advocates are always thinking about how the argument works for the judge. They must free themselves from the baggage of detail that comes from having lived with a case for months or years and present the argument in a context in which the judge, who has little background in it, can easily receive it. This requires a careful ordering of the submission. It requires providing context before detail. And, most of all, it requires providing context that anticipates and renders unnecessary the always-looming judicial question "Why are you telling me this?" – a question that is the litmus test of whether an advocate is speaking with the judge, or someone else, in mind. Good advocates can, at any stage

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of argument, answer the "Why are you telling me this?" question – but their aim is to provide context in such a way and at such appropriate points that the question is answered before it is asked.

The good advocate also provides the context that will anticipate and address the judge's expected reaction to the consequence of a submission. Consider these two examples:

a) "My client has a valid default judgment, and it is irrelevant that the default was due to the sloppiness of the defendant's lawyer."
b) "Of course, your honour will be concerned that the effect of my submission to uphold the default judgment will be to deny the defendant her day in court against my client because of a default that is the result of her lawyer's neglect.

That concern in another case might be decisive. But here it is outweighed by the failure of the defendant, despite having a new lawyer, to show any defence worthy of a day in court with my client. If it is right for the defendant to blame her lawyer, the defendant can have her day in court with him."

The first argument provides no context and shows no empathy. It simply says to the judge, "You might not like the result, but suck it up." The second argument provides context – it "feels for" the judge's distaste for the result while gently talking the judge out of giving effect to that reluctance.

Good advocates also empathize with the judge by contextualizing the issues the judge must decide. They provide context by formulating the argument to identify the issues they are addressing and suggesting answers to the issues raised by the other party. They do not simply make points and leave it to the judge to do the heavy lifting – consider the point, try to relate it to what the opponent said, find the points of intersection, formulate the issues and then pick a side – all on the judge's own. Good advocates provide context by defining and suggesting answers to the issues.

Consider this hypothetical reply by the plaintiff's counsel:

> The defendants' argument can be encapsulated as raising two reasons why they should be excused from performing the contract. All of their submissions about the costs they incurred to resell the products made by my client are really an argument that the contract had become unprofitable for them to perform. And all of their submissions about the

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> meetings they had with Mr. Jones of my client come down to a submission that they obtained an oral waiver of performance. My answer to the first issue is that continued profitability was not a term of the contract. They never bargained for or obtained any such guarantee from my client. My answer to the second issue is that what Mr. Jones said to the defendants does not meet the requirements of waiver either under the contract or under the Supreme Court's definition of waiver.

The importance of context to the way in which an argument will be received can be illustrated by returning to the example of the oral amendment given above. Some may think a submission should be right or wrong regardless of context. But how effective would the "had to be in writing" submission be if it were preceded by a lengthy and detailed attack on the correctness of the trial judge's findings of fact and credibility about what was orally agreed, coupled with a suggestion that the trial judge should have found an oral amendment consisting of different terms? That attack makes it sound like the parties really did think it was appropriate to address amendments orally and to litigate about what was said, and, by creating that context, deprives the "had to be in writing" submission of its contextual air of reality.

CONCLUSION

Shakespeare said, "There is nothing either good or bad, but thinking makes it so." A particular kind of thinking – a belief in the power of context – is an essential part of what makes up good advocacy. Arguments may not be either good or bad as much as they may be good in the right context and bad in the wrong context.

Others who know more about good advocacy than I may try to show that I am wrong. They may identify the arguments I have taken out of context and show what becomes of them if put in proper perspective. They may show that by setting things in the "right" order different conclusions may flow, gently pointing out that while they take no pleasure in cataloguing my errors, by doing so and providing corrections they will help the reader come to more correct views. They may even provide better bridges than I have toward getting the reader to understand what I have been trying to say.

And if they do, haven't I made my point?

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